Supreme Court, U. S.
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NO. 80-351

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

FRANK R. MAGNELLI,
PETITIONER

V.

COMMONWEALTH OF PENNSYLVANIA
STATE CIVIL SERVICE COMMISSION

AND

PENNSYLVANIA LIQUOR CONTROL BOARD
RESPONDENTS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. HISTORY OF THE CASE

On August 29, 1977, Frank R. Magnelli (herein referred to as Petitioner) was discharged for gross misconduct as an employee. The details of his misconduct were conveyed to Petitioner at the time of his discharge. Petitioner appealed the discharge to the Pennsylvania State Civil Service Commission which, on August 24, 1978, after a full hearing, found that sufficient evidence was presented by the Board to justify Petitioner's discharge. Petitioner appealed the Adjudication to the Commonwealth Court of Pennsylvania which, in a decision rendered December 11, 1979, found that the record supported the Commission's finding. Petitioner filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was denied by Order dated June 23, 1980. On September 4, 1980,

Petitioner filed the present Petition for Writ of Certiorari to this Court.

II. REASONS FOR DENYING WRIT

The decision which is the subject of this Petition does not warrant consideration by this Court for several reasons. First, the decision is manifestly correct. Second, the decision is based on non-Federal grounds which adequately support the State's judgment. Third, the Petitioner's actions, in accusing the Chairman of the Pennsylvania Liquor Control Board of criminal activity, were false and reckless and not within the ambit of Pickering v. Board of Education, 391 U.S. 563. Fourth, the Petition does not present a Federal question of significance or substance. Fifth, the Petitioner's procedural due process rights were not violated by the Pennsylvania State Civil Service Commission.

A. THE RECORD IS SUFFICIENT TO SUSTAIN THE FINDINGS OF THE CIVIL SERVICE COMMISSION.

The material facts of this case are not in dispute. The reasons for Petitioner's removal are clearly set forth in Item "A" of the Index of Items identified in the Record at 12. It was not contested that on July 23, 1959, Petitioner executed his oath of office and swore to "obey the orders of the Pennsylvania Liquor Control Board and the officers appointed over me, according to the rules and regulations officially adopted." (Appointing Authority Exhibit No. 21, R.87). The form of the oath has not been changed (R.87). The Pennsylvania Liquor Control Board promulgated its current Handbook for Enforcement Officers on May 1, 1971. The Forward of the Handbook provides that its provisions "shall remain in effect until amended or rescinded." The Forward is signed by the three members of the Board

and the Director of the Bureau of Enforcement in office at that time. (Appointing Authority Exhibit No. 12). It was not contested that on February 14, 1972, Petitioner executed a certification that he had been issued the current Handbook for Enforcement Officers and that he read it and fully understood its contents. (Appointing Authority Exhibit No. 20). The Handbook, page A-4, provides:

> "All officers are employed on a full-time basis and are subject to duty at all hours of the day and night, seven days a week. Therefore, any other business, occupation or employment of a gainful nature is prohibited, even on a part-time basis."
> (Emphasis added)

Admittedly, Petitioner served as a Master in Divorce cases on at least eleven (11) occasions and handled an unspecified number of arbitrations for which he was paid. (Appointing Authority Exhibits Nos. 1 through 11; R. 141 - 157). The Handbook, beginning on page A-8, lists examples of

behavior constituting grounds for disciplinary action up to and including dismissal. Number 13 on said list states:

> "Engagement in any other business, occupation or employment for gain."

It was not contested that Petitioner was listed as a practicing attorney with an office in the Pennsylvania Legal Directory and the Yellow Pages of the Harrisburg Telephone Book. (Appointing Authority Exhibits Nos. 13 and 14). It was also admitted that he paid the required fee and was registered with and was issued a card by the Court Administrator of Pennsylvania as an active as opposed to inactive member of the bar of Pennsylvania (R. 160). In short, since at least October of 1973, and continuing into 1977, the records show beyond any conceivable doubt that Petitioner was actively engaged in the practice of law and was paid for it. Whether or not he made a profit is immaterial. The in-

tolerable conflict between his activities is obvious, of course. As a lawyer, a sworn officer of the Court, he undertook obligations to perform certain tasks at certain specified times and those obligations determined the legal rights of litigants, the very heart of a lawyer's professional and ethical duty. At the same time, he was obligated by the Handbook which set forth his conditions of employment as an enforcement officer, a supervisor in fact. He was sworn to follow the rules promulgated by the Handbook which required him to be available seven (7) days a week. He deliberately placed himself in an impossible position between two sworn duties constantly open to collision and compromise.

The Handbook, beginning on page A-8, also lists as an example of grounds for disciplinary action No. 22, which states:

> "Falsification, oral or written, of reports, records or communications by commission, omission, deception or fraud, alone or in collusion with others."

Admittedly, Petitioner took sick leave on at least the following dates for the purpose of engaging in the practice of law: May 8, 1973; June 5, 1974; July 9, 1974; February 20, 1976 and March 7, 1977. (Appointing Authority Exhibits Nos. 16, 24, 25 and R. 161). Without contradiction, Ronald Rowe, Director of Labor Relations for the Appointing Authority, testified that he had handled disciplinary actions since 1970 (R. 174), and he further stated that:

> "The discipline practice of the Board on abuse of sick leave, falsification of sick leave, has generally been that the Board views that as tantamount to theft, a fraudulent misrepresentation of a reason to get paid sick leave when you're not truly sick and are out doing something else. And generally the Board has reacted with discharge."

Rowe further testified without contradiction that in cases of willful misrepresentation or falsification, the Appointing Authority has discharged employees on the first such offense (R. 175). He testified without contradiction that the Appointing Authority has reacted with discharge in every such case of which he was aware (R. 175).

B. THE DECISION WHICH PETITIONER SEEKS TO HAVE REVIEWED WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS.

Furthermore, examination of the Petition for Review filed by Petitioner before the Commonwealth Court reveals that the constitutional challenges now asserted were not placed before that Court. The decision of the Commonwealth Court was also based upon grounds established under State law. Therefore, as the decision below was based upon adequate non-Federal grounds, i.e., a finding of substantial

evidence in support of the fact-finder's finding of "just cause" for removal, there exists no substantial Federal question for revi w by this Court. See Murdock v. Memphis, 20 Wall. 590, 636; Berea College v. Kentucky, 211 U.S. 45, 54; Fox Film Corp. v. Muller, 296 U.S. 207.

C. THE PETITIONER'S ACTIONS DID NOT AMOUNT TO AN EXERCISE OF FREE SPEECH WITHIN THE PRINCIPLE ENUNCIATED IN PICKERING V. BOARD OF EDUCATION.

Petitioner contends that the decisions below conflict with the freedom of speech principle enunciated in Pickering v. Board of Education. There is an important factual difference between that case and the present matter. Pickering was dismissed solely for writing a letter to a newspaper which criticized the position of his employers

with respect to school finances. Petitioners's discharge was upheld on the grounds that he engaged in a prohibited other business and misused sick time to do so. Furthermore, this Court, in Pickering, noted that false statements knowingly or recklessly made were not within the ambit of the First Amendment-Free Speech Clause. A review of the record below would indicate that Petitioner's accusations against the Chairman of the Board were false statements knowingly or recklessly made.

A cause of Petitioner's removal was that he violated another provision of the Handbook. Among the grounds listed for disciplinary action on page A-9 is Number 21, which states:

> "Personal conduct while on or off duty, which may tend to bring the service of the Bureau, Board or Commonwealth into disrepute."

Another cause was that he violated page A-9, Number 26, which states:

> "Any adverse criticism of Bureau or Board policy, Hearing Examiners, Deputies, Attorneys, other Enforcement Officers, supervisory personnel, local authorities, other agencies or officials or the Code except in writing to the Office of the Director through channels."

Both of the above provisions were violated when Petition wrote to the Attorney General of the Commonwealth accusing the Chairman of the Pennsylvania Liquor Control Board of a crime in connection with the approval of a liquor license. He caused an investigation of the Chairman by the Justice Department which completely exonerated the Chairman. (Appointing Authority Exhibits Nos. 17 and 18). The entire matter was based upon a recommendation which emanated from Enforcement District 3. The recommendation was reversed at a higher level by two superiors with the concurrence of the Board Chief Counsel

(Appointing Authority Exhibit No. 19, R. 255), and Petitioner made no effort to determine whether or not his superiors at the central office rejected the recommendation. In fact, the recommendation was rejected and the citation issue never reached the Members of the Pennsylvania Liquor Control Board. (R. 76 - 79). Apparently unknown to Petitioner, contracts to transfer licenses can be specifically enforced by the courts subject to approval of the transfer by the Liquor Control Board. Also, contrary to his allegations, the full Board did approve the transfer in the exercise of their discretion under the law. (Appointing Authority Exhibit No. 22, R. 89-91). His allegations were irresponsible in that he was not in a position to know the facts upon which to accuse Chairman Kaplan of a crime. Whether or not such conduct was sufficient to constitute "just cause" for

discharge, it was certainly sufficient to justify a finding by the Civil Service Commission that Petitioner was antagonistic to his employer and its Chairman in particular. Moreover, he admitted to the Justice Department Investigator that he did not go through channels as required. (R. 63). Additionally, Petitioner admitted bypassing required channels at the hearing. (R. 151 - 153).

The Commission made a finding of fact that Petitioner had little or no respect for his superiors, the Chairman or Members of the Pennsylvania Liquor Control Board (F.F. 19, 20). It is not unusual, nor should it be unexpected that an agency would conduct a full-scale investigation of an employee whose conduct was so antagonistic, reckless and irresponsible as to bring dishonor to his superiors. Moreover, it cannot be reasonably argued

that serious, deliberate violations of the rules and regulations of the Appointing Authority which would otherwise constitute "just cause grounds for dismissal" cannot be considered in a disciplinary hearing merely because these violations were uncovered as a result of an investigation. In fact, there is nothing in the record, albeit the opinion of the Petitioner, which would show a causal relationship between the investigation of Petitioner and retaliative motives.

The gravamen of Petitioner's Petition is that the "real reason" for his discharge was retaliation for his exercise of his free speech rights. As demonstrated above, this issue was raised on the record. "Pretext" is a factual determination. It was an argument rejected by the finder of fact.

D. THE PETITION DOES NOT PRESENT A FEDERAL QUESTION OF SIGNIFICANCE.

The Pennsylvania Supreme Court has previsouly declined to hear a discretionary appeal of this matter, applying a procedural rule expressly modelled on United States Supreme Court Rule 19 and employing similar considerations.[1] The issue in this case relates solely to whether there existed a just-cause basis for Petitioner's discharge. This determination was made by the Pennsylvania State Civil Service Commission and affirmed by the Commonwealth Court of Pennsylvania.

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[1]Rule 1114, Pa. R. App. P., provides that an appeal is "not a matter of right but of sound judicial discretion and an appeal will be allowed only when there are special important reasons therefor".

E. THE PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE PENNSYLVANIA CIVIL SERVICE COMMISSION.

The Petitioner's assertion of a violation of the procedural due process requirements to the Fourteenth Amendment to the Constitution of the United States, is without merit.

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved the demands of due process are fulfilled."
> Anderson National Bank v. Luckett, 321 U.S. 233, 246.

At the State level, Petitioner was afforded full notice and hearing before the Pennsylvania State Civil Service Commission on his removal from employment with the Respondent, Pennsylvania Liquor Control Board. Judicial review of the

Commission's determination and proceedings was afforded Petitioner in compliance with 2 Pa. C.S.A. Chapter 7, Sub-Chapter A, by the Commonwealth Court of Pennsylvania under its appellate jurisdiction as established by Section 763 of the Judicial Code of Pennsylvania. 42 Pa. C.S.A. §763. Thus, Petitioner had all the process that was due. The mere fact that Petitioner was unsuccessful below does not establish that there has been a violation of due process. Worchester County Trust Co. v. Riley, 302 U.S. 292.

III. THE STATE CIVIL SERVICE COMMISSION IS IMPROPERLY NAMED AS A PARTY TO THESE PROCEEDINGS.

Petitioner cites 28 U.S.C. §1257(3) as the jurisdictional basis for his Petition for Writ of Certiorari. That provision states in pertinent part, that:

> "Final judgments on decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:...
>
> "(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

The Supreme Court of Pennsylvania is the highest Court of the State. Its jurisdiction, over matters such as that here under consideration, is discretionary as established by the Pennsylvania Judicial Code. Act of July 9, 1976, P.L. 586, No. 142 §2, 42 P.S. §§723, 724. In this case, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal there entered by Petitioner. Where the highest Court of the State has discretionary authority to accept or refuse to hear an appeal from a lower Court and refuses to do so, the decision to be reviewed

by this Court is that rendered by the next lower Court. Virginian Railway Co. v. Mullens, 271 U.S. 220; Gregory v. McVeigh, 90 U.S. 294. In this case, the next lower Court rendering a decision was the Commonwealth Court of Pennsylvania.

Rule 19.6 of the Rules of the Supreme Court of the United States states, in pertinent part, that:

> "All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court . . ."

Although the Pennsylvania State Civil Service Commission was named as a Respondent in the Petition for Review filed before the Commonwealth Court of Pennsylvania, that Court, acting under Rule 1513 of the Pennsylvania Rules of Appellate Procedure, deleted the Commission as a party. Pa.R.A.P. §1513, 42 Pa. C.S.A.; Appendix A, Order dated Spetember 6, 1978. As the Commission

was, therefore, not a party to "the proceeding in the Court whose judgment is sought to be reviewed," it is apparent that the Commission has been improperly named as a party to these proceedings.

IV. CONCLUSION

WHEREFORE, based on the foregoing, the Respondents respectfully request this Honorable Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day of October, 1980, three copies of the Brief of Respondents in Opposition to Petition for Writ of Certiorari, were mailed, postage pre-paid, to Frank R. Magnelli, pro se, Counsel of Record, 221 South 31st Street, Harrisburg, Pennsylvania 17109. I further certify that all parties required to be served have been served.

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